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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1532

TONY DARWIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

OPINION OF THE COURT BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL AND STATUTORY PROVISIONS ... 3

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE PETITION 8

I. The Decision of the Court of Appeals Denying the Jury Composition Challenge Raises Important Federal Questions Concerning Which There Is a Conflict in the Circuits and a Particular Need for Uniform Standards 8

II. The Decision of the Court of Appeals Denying Petitioner's Rule 30 Claim Raises Important Federal Questions Concerning Which There Is a Conflict in the Circuits and a Particular Need for Uniform Standards 9

CONCLUSION 13

APPENDICES:

A. *United States v. Maskeny, et al.*, No. 78-5596 (5th Cir., March 12, 1980) (Order staying mandate) 1a

B. The appendices reprinted in the companion Petition of Petitioners Maskeny, Harvey, Perkins, Blackburn, Crocker, Murchison, Pernell, Toombs, and Pernell, filed in this Court on March 14, 1980, are incorporated herein by reference 3a

TABLE OF AUTHORITIES

Cases:

Cross v. United States, 353 F.2d 454 (D.C. Cir. 1965) 11

Downie v. Powers, 193 F.2d 760 (10th Cir. 1951) 9

Hamling v. United States, 418 U.S. 87 (1974) 9

Ross v. United States, 180 F.2d 160 (6th Cir. 1950) 9, 10

Cases, continued: Page

United States v. Baron, 602 F.2d 1248 (7th Cir. 1979 11

United States v. Clay, 495 F.2d 700 (7th Cir. 1974) 9

United States v. D'Argento, 373 F.2d 307 (7th Cir.), *cert. denied*, 389 U.S. 833 (1967) 10

United States v. Harvill, 501 F.2d 295 (9th Cir. 1974) . . . 10, 11

United States v. Kroncke, 459 F.2d 697 (8th Cir. 1972) 10

United States v. Mendoza, 473 F.2d 697 (5th Cir. 1973) 11

United States v. Newson, 531 F.2d 979 (10th Cir. 1976) 10

United States v. Wander, 601 F.2d 1251 (3rd Cir. 1979) 9, 10

Walker v. United States, 418 F.2d 1116 (D.C. Cir. 1969) 11

Whitlock v. United States, 429 F.2d 942 (10th Cir. 1970) . . . 10

Wright v. United States, 339 F.2d 578 (9th Cir. 1964) 9, 10

Constitutional and Statutory Provisions:

Amendment V, United States Constitution 3

Amendment VI, United States Constitution 3

Rule 22(2), Rules of the Supreme Court 2

Rule 30, Federal Rules of Criminal Procedure . . . . . *passim*

Title 18, United States Code, § 2 5

Title 21, United States Code, § 802(15) 4, 7

Title 21, United States Code, § 841(a) 5

Title 21, United States Code, § 846 5

Title 21, United States Code, § 852(a) 5

Title 21, United States Code, § 960 5

Title 21, United States Code, § 963 5

Title 28, United States Code, § 1861 3

Title 28, United States Code, § 1863(b)(2) 4

Title 28, United States Code, § 1867(a) 3

Page

Additional Authorities:

The authorities cited in the companion Petition of Petitioners Maskeny, Harvey, Perkins, Blackburn, Crocker, Murchison, Pernell, Toombs, and Pernell, filed in this Court on March 14, 1980, are incorporated herein by reference.

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OCTOBER TERM, 1979

No.

TONY DARWIN,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Tony Darwin, by his undersigned counsel, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 4, 1980.

OPINION OF THE COURT BELOW

The Opinion of the Court of Appeals has not yet been reported. A copy of the Opinion is appended to the companion Petition of Petitioners Maskeny, Harvey, Perkins, Blackburn, Crocker, Murchison, Pernell, Toombs, and Pernell, filed in this Court on March 14, 1980, as Appendix A, and is incorporated herein by reference.

JURISDICTION

The Judgment of the Court of Appeals affirming the Judgment of the United States District Court was entered on January 4, 1980. (Companion Petition, Appendix B.) The Petitions for Rehearing and Petition for Rehearing with Suggestion for Rehearing *En Banc* were denied on February 14, 1980. (Companion Petition, Appendix C.) This Petition is filed pursuant to Rule 22(2), Rules of the Supreme Court. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code § 1254(1).

QUESTIONS PRESENTED

I.

A. IN JURY COMPOSITION CASES, SHOULD A STANDARD BE ESTABLISHED THAT CLEARLY DIFFERENTIATES BETWEEN ALLOWABLE AND IMPERMISSIBLE DEVIATION FROM THE CROSS SECTIONAL IDEAL, AND, IF SO, WHICH STANDARD SHOULD BE ADOPTED?

B. DID THE COURT OF APPEALS ERR BY ESTABLISHING A 10% ABSOLUTE DISPARITY AS A MINIMUM REQUIREMENT FOR A PRIMA FACIE CASE AND BY ADOPTING THE "SUBSTANTIAL IMPACT RULE," BOTH OF WHICH HAVE THE EFFECT OF VALIDATING SERIOUS UNDER-REPRESENTATIONS OF SMALL AND MEDIUM SIZED MINORITIES?

II.

WHETHER THE FAILURE OF THE TRIAL COURT TO COMPLY WITH RULE 30 CAN BE HARMLESS ERROR WHEN PETITIONER'S COUNSEL REASONABLY RELIED UPON THE COURT'S ASSURANCE THAT A REQUESTED JURY INSTRUCTION WOULD BE GIVEN AND COUNSEL WERE, THEREBY, MATERIALLY MISLED IN MAKING CLOSING ARGUMENT?

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment V, Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law . . . ."

Amendment VI, Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

United States Code, Title 28, § 1861.
Juries; Declaration of Policy.

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district court of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

United States Code, Title 28, § 1867(a).
Juries; Challenging Compliance with Selection Procedures.

In criminal cases, . . . the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

United States Code, Title 28, § 1863(b)(2).
Juries; Plan for Random Jury Selection.

Among other things, such plan shall—

specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters of the political subdivisions within the district or division. The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title. . . .

United States Code, Title 18, Federal Rules of Criminal Procedure, Rule 30.
Instructions.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. . . . The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. . . .

United States Code, Title 21, § 802(15).
Definitions.

The term "marijuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture of such mature stalks (except the resin extracted therefrom),

fiber, oil, or cake or the sterilized seed of such plant which is incapable of germination.

STATEMENT OF THE CASE

Petitioner was convicted in a jury trial before the United States District Court for the Southern District of Georgia in June 1978, of offenses based upon the importation and possession of marijuana in violation of Title 21 United States Code §§ 841(a)(1), 846, 852(a), 960, 963 and Title 18 United States Code § 2.

Prior to the jury being sworn, Petitioner challenged the jury panel as not representative. (Tr. 56.) Petitioner, in the interest of judicial economy, timely moved the court to incorporate into the record the arguments and exhibits supporting the jury challenge made in *United States v. Richard Harrison Lyons*, Docket No. CR 277-12 (United States District Court for the Southern District of Georgia, Brunswick Division). The trial judge granted incorporation without objection from the government and then overruled the Petitioner's challenge. (Tr. 202-203, 393-394.)[1]

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[1] Petitioner's grand and petit juries were both selected from the 1977 revision of the District's jury wheels. In *Lyons*, only the petit jury was selected from the 1977 wheel. The grand jury was selected from the 1973 wheel. Counsel discovered that challenges to the 1977 jury wheels had been brought in *United States v. Auviene D'Agtignac*, Docket No. 278-38 (United States District Court for the Southern District of Georgia, Brunswick Division), *appeal docketed*, No. 79-5007 (5th Cir. Jan. 2, 1979), and *United States v. Michael Thomas Smith, et al.*, Docket No. CR 278-40 (United States District Court for the Southern District of Georgia, Brunswick Division), *aff'd sub nom. United States v. Butler, et al.*, No. 78-5777 (5th Cir. decided Feb. 14, 1980), and moved for incorporation thereof in order that the correct demographic data would be in the record as to Petitioner's grand jury panel. The trial judge granted Petitioner's motion to incorporated, with the

The uncontested evidence in support of the jury challenge showed, *inter alia*, that blacks constituted 29% of the population and 20% of the qualified wheel from which the grand jury was chosen. The Court of Appeals ruled that this disparity was not large enough to establish a prima facie case. The court held that an absolute disparity of 10% is a minimum requirement for a prima facie case and that the "impact" of the disparity was not substantial in terms of the number of black people who would not appear on an average grand jury panel.

At trial, the main defense was that there were several species of marijuana, that the statute only proscribed one of these, Cannabis sativa L, and that the government had not met its burden of proving that the substance in question was Cannabis sativa L, as opposed to one of the other species. Evidence was presented to the jury with the express approval of the trial judge, treating the statutory definition of the Cannabis sativa L as a question of fact.[2] Petitioner's Motion for Judgment of Acquittal was argued based upon the government's alleged failure to prove that the substance was in fact the species of marijuana proscribed by the statute and upon detailed arguments regarding the statutory definition of marijuana.[3] (Tr. 678-687.)

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caveat, *inter alia*, that the records be appended to Petitioner's record solely for informational purposes in the Fifth Circuit. (Companion Petition, Appendix E.) That these records were so utilized is evidenced by the opinion of that court in Petitioner's case.

[2]There were no relevancy objections either by the government or the court to the numerous questions concerning the polytypic nature of the genus Cannabis propounded by counsel to the chemist testifying on behalf of the government. (Tr. 603-677.)

[3]At the hearing on Petitioner's motion, the court was openly advised by defense counsel of the Fifth Circuit's decision in *United States v. Gaines*, 489 F.2d 690 (5th Cir. 1974), authority contrary to Petitioner's grounds for dismissal. (Tr. 681.)

The court denied Petitioner's Motion for Judgment of Acquittal, holding for the purposes of deciding the motion that all species of Cannabis were proscribed by the statute. (Tr. 685.) Contrary to this holding, the court continued to treat the question as if it were a factual matter to be considered by the jury.[4] Petitioner called Dr. Dwight S. Fullerton as an expert witness. The material portion of Dr. Fullerton's testimony related solely to the fact that there are a number of species of cannabis and the differences between them. There were no relevancy objections. (Tr. 721-749, 759-787.)

Counsel submitted three proposed jury instructions, including an instruction consisting basically of the statutory definition of marijuana found in Title 21 United States Code § 802(15).

At a bench conference (not found in the record), counsel requested information concerning the court's proposed action on the requested instructions. The judge rejected only the two proposed instructions not relating to the statutory definition of marijuana. (*See* Tr. 976.)

Based upon this ruling, counsel argued to the jury that:

> "His Honor is going to instruct you further later in this case that the law defines marijuana as all parts of the plant Cannabis sativa L. And, he is going

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[4] In a subsequent colloquy with Petitioner's counsel, the court stated:

> MR. MIKA: That doesn't mean that we can't still argue it before the jury?
>
> THE COURT: You mean as to whether this is marijuana? Surely you can argue that. In fact, I'm going to charge that unless the government proves beyond a reasonable doubt that that is marijuana as defined in the statute that the defendants will be acquitted. [Tr. 687.]

> to say unless you find beyond a reasonable doubt that the substance in question is marijuana as it is defined in that definition then you must find the defendants not guilty." [Tr. 891.]

The court, in fact, gave the proposed instruction as requested, but went on to add:

> "I instruct you that under the law there is only one species of the plant in question, that is to say, marijuana. Marijuana as far as the law is concerned, is not divided into species." [Tr. 960.]

Objection was accordingly made and exception taken to the court's instruction. Judge Lawrence accepted the objection as timely made. (Tr. 976-977.)

The jury found the Petitioner guilty. Petitioner was sentenced to a period of incarceration and posted an appeal bond.

An appeal was timely filed in the United States Court of Appeals for the Fifth Circuit. The panel opinion was entered on January 4, 1979. (Companion Petition, Appendix A.) The Petition for Rehearing with Suggestion for Rehearing *En Banc* was denied on February 14, 1980. (Companion Petition, Appendix C.)

REASONS FOR GRANTING THE PETITION

I.

THE DECISION OF THE COURT OF APPEALS DENYING THE JURY COMPOSITION CHALLENGE RAISES IMPORTANT FEDERAL QUESTIONS CONCERNING WHICH THERE IS A CONFLICT IN THE CIRCUITS AND A PARTICULAR NEED FOR UNIFORM STANDARDS.

The statement of reasons for granting the petition advanced in the companion Petition of Petitioners

Maskeny, Harvey, Perkins, Blackburn, Crocker, Murchison, Pernell, Toombs, and Pernell, filed in this Court on March 14, 1980, succinctly and sufficiently sets forth Petitioner's challenge to the decision of the Court of Appeals denying the jury composition challenge. That statement is, in the interest of judicial economy, incorporated herein by reference.

II.

THE DECISION OF THE COURT OF APPEALS DENYING PETITIONER'S RULE 30 CLAIM RAISES IMPORTANT FEDERAL QUESTIONS CONCERNING WHICH THERE IS A CONFLICT IN THE CIRCUITS AND A PARTICULAR NEED FOR UNIFORM STANDARDS.

The statement of reasons for granting the petition advanced in the companion Petition of Petitioners Maskeny, Harvey, Perkins, Blackburn, Crocker, Murchison, Pernell, Toombs, and Pernell, filed in this Court on March 14, 1980, is incorporated herein by reference.

Additionally, application of Rule 30 has produced judicial conflict which obscures the purpose of the rule and the limited test that this Court read into Rule 30 in *Hamling v. United States,* 418 U.S. 87 (1974). At least five circuits have specifically recognized that the object of the rule "is to require the judge to inform the trial lawyers in a fair way what the charge is going to be, so that they may intelligently argue the case to the jury." *United States v. Wander,* 601 F.2d 1251 (3rd Cir. 1979); *United States v. Clay,* 495 F.2d 700, 707 (7th Cir. 1974); *Wright v. United States,* 339 F.2d 578, 580 (9th Cir. 1964); *Downie v. Powers,* 193 F.2d 760, 766-767 (10th Cir. 1951); and *Ross v. United States,* 180 F.2d 160, 165 (6th Cir. 1950).

A standard for reversal that is consistent with this purpose is:

> . . . whether the party was unduly and unfairly prevented from making his argument to the jury or was substantially misled by the court's actions or inactions in formulating his arguments. *Whitlock v. United States*, 429 F.2d 942, 946 (10th Cir. 1970).

Even more recently, the Ninth Circuit in *United States v. Wander*, 601 F.2d 1251 (9th Cir. 1979), indirectly adopted this standard, reaffirming its earlier opinion in *Wright v. United States*, 339 F.2d 578 (9th Cir. 1964). The court stated that:

> It [is] the court's failure to advise counsel of its ruling prior to closing argument, not the soundness of that ruling, which violated Rule 30 and prejudicially affected counsel's summation. 601 F.2d at 1262-1263.

In *Wander*, where counsel for defendants relied substantially on proposed instructions materially modified by the trial judge, it was considered irrelevant whether the actual instruction delivered by the judge "reflects a better statement of the law." 601 F.2d at 1262. This decision, like the panel decisions in *Wright v. United States*, 339 F.2d 578 (9th Cir. 1964); *United States v. Harvill*, 501 F.2d 295 (9th Cir. 1974); *United States v. Kroncke*, 459 F.2d 697 (8th Cir. 1972); and *Ross v. United States*, 180 F.2d 160 (6th Cir. 1950), directly conflicts with the rulings of the Seventh Circuit in *United States v. D'Argento*, 373 F.2d 307 (7th Cir.), *cert. denied*, 389 U.S. 833 (1967), and the Tenth Circuit in *United States v. Newson*, 531 F.2d 979 (10th Cir. 1976). The Seventh and Tenth Circuits have concluded that the failure of the trial judge to inform counsel of his proposed action upon requested instructions,

regardless of whether counsel was actually misled in closing argument, is not reversible error when the jury is properly and sufficiently instructed and the instruction is not a misstatement of law.

Still another standard was promulgated and applied by a panel of the Fifth Circuit in *United States v. Mendoza*, 473 F.2d 697 (5th Cir. 1973), and followed by the Ninth Circuit in *United States v. Harvill*. In each case, the courts stated that:

> Although we recognize that the evidence against the [defendant] is nearly overwhelming, we cannot say with reasonable certainty that the outcome would be the same if the defense had argued before the jury with accurate information about the Trial Judge's proposed action upon the requested jury instructions. 501 F.2d at 297.

These decisions are in direct conflict with the decision of a panel of the District of Columbia Circuit in *Walker v. United States*, 418 F.2d 1116 (D.C. Cir. 1969), and the opinion of the Fifth Circuit in Petitioner's case. The District of Columbia court expressly found that "[w]hile it is never possible to assert with absolute certitude that the results could not have been different if the [Rule 30] error had not been committed . . . the relative strength of the evidence against the defendant is a material factor in weighing whether trial errors require reversal." 418 F.2d at 1118. *See also, Cross v. United States*, 353 F.2d 454, 456 (D.C. Cir. 1965).

The Seventh Circuit, in *United States v. Baron*, 602 F.2d 1248 (7th Cir. 1979), decided the Rule 30 claim by merely concluding that "a failure to comply with Rule 30 constitutes reversible error only if it impairs the effectiveness of the defense." 602 F.2d at 1254. Thus, this panel failed to formulate a workable test that would

allow the district courts to measure the effect of a Rule 30 violation in any given case.

The total absence of a uniform standard for evaluating the prejudice to a defendant when there is a Rule 30 violation has fostered irreconcilable results and improper and unsupported judicial speculation concerning the supposed effect of undelivered instructions on a jury. Formulation of a uniform standard by this Court is necessary to avoid continued speculation and disparate results in the courts of appeal.

The standard followed by the Ninth and Tenth Circuits and followed in the Fifth Circuit until the panel decision in Petitioner's case is the standard most consistent with the recognized object of the Rule and should be the test adopted by this Court.

CONCLUSION

For the reasons stated, petitioner prays that this Court issue a Writ of Certiorari.

Respectfully submitted,

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March 31, 1980

Appendix

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-5596

[Filed: March 12, 1980

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DONALD GEORGE MASKENY, LEE DURWOOD HARVEY, MARK TIMOTHY PERKINS, JOSEPH CHARLES BLACKBURN, SR., CHARLES MICHAEL CROCKER, KENNETH MURCHISON, SIDNEY LARRY PERNELL, BARRY WAYNE TOOMBS, TONY DARWIN and JULIAN THOMAS PERNELL,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

ORDER

The motion of appellant, Tony Darwin, for recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including March 30, 1980, the stay to continue in force until the final disposition of the case by the Supreme Court,

provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ James P. Coleman
Chief Judge

APPENDIX B

The Appendices reprinted in the companion Petition of Petitioners Maskeny, Harvey, Perkins, Blackburn, Crocker, Murchison, Pernell, Toombs, and Pernell, filed in this Court on March 14, 1980, are incorporated herein by reference.